No. 92-166

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

KEENE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICI CURIAE WHITNEY BENEFITS, INC. AND PETER KIEWIT SONS' CO. IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Amici curiae Whitney Benefits, Inc. and Peter Kiewit Sons' Co. ("Amici") are co-plaintiffs and judgment creditors in *Whitney Benefits, Inc. v. United States*, a Claims Court action against the United States for just compensation under the Fifth Amendment. Because Amici may be directly affected by the outcome in this case and because the circumstances of Amici's own action shed light on the issues presented, Amici submit this brief for the Court's consideration.[1]

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[1] This brief is being filed with the consent of the parties, whose letters of consent have been filed with the Clerk of the Court.

Amici filed their action in 1983, alleging that enactment of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") effected a taking of their mining property. In 1989, the Claims Court found that Amici were entitled to just compensation and entered a final judgment in the amount of $60,296,000 plus interest and attorneys' fees. *See Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 417 (1989). In 1991, the Court of Appeals for the Federal Circuit affirmed that final judgment in all respects and this Court denied the government's petition for a writ of certiorari. *See Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991). Amici are therefore entitled to receive payment of their adjudicated just compensation once the trial court has clarified the amount of interest to which Amici are entitled.

But instead of accepting this final adjudication, the government has seized on the Federal Circuit's subsequent decision in the present case. In a belated attempt to avoid satisfying Amici's final, fully-appealed judgment, the government has moved under the Claims Court's Rules 60(b)(4) and 12(b)(1) (identical to Fed. R. Civ. P. 60(b)(4) and 12(b)(1)) to vacate that judgment and dismiss Amici's Claims Court action, contending that a District Court action filed by Amici in 1984 divested the Claims Court of jurisdiction under the reinterpretation of 28 U.S.C. § 1500 announced in the decision below. Thus, the government has shown in Amici's case that it intends to use the Federal Circuit's change in the law not just to seek dismissal of Claims Court actions that are still pending, but also to reach back and upset final, fully-appealed judgments.

And the government has shown that it intends to take this position even where, as in Amici's case, the parties seeking compensation were forced to file their District Court suit because of the government's own actions—actions that were taken long before the Federal Circuit

changed the rules through the decision below. Amici filed their District Court suit only after the government had successfully moved to dismiss Amici's Claims Court action on the ground that Amici were obligated to pursue an exchange of federal coal property under § 510(b)(5) of SMCRA, 30 U.S.C. § 1260(b)(5) (1988), before they could seek just compensation in the Claims Court. Their Claims Court action having been dismissed on that ground, Amici had no choice but to return to the Interior Department's administrative coal exchange process that they had already been pursuing for many years without result.

Thus, shortly after the dismissal of their Claims Court action (and while appealing that dismissal), Amici filed suit in District Court against the Secretary of the Interior pursuant to SMCRA's "citizen's suit" provision, 30 U.S.C. § 1270(a) (1988), under which property owners whose coal has been rendered unminable by the Act may compel the Secretary to offer a coal exchange in accordance with SMCRA.[2] As the District Court eventually found, Amici's citizen's suit was made necessary because the government had "unreasonably delayed" carrying out its statutory duty to offer an exchange. *See Whitney Benefits, Inc. v. Hodel*, No. C84-193K, slip op. at 8 (D. Wyo. May 23, 1985) (Findings of Fact and Conclusions of Law). Nevertheless, the government seeks to apply the Federal Circuit's change in the law against Amici even though the government's own actions gave Amici no choice but to file suit in District Court as a prerequisite for prosecuting their claim in the Claims Court.

The government's intended misuse of the decision below is further shown by the fact that while the government raised a § 1500 argument in Amici's case, it

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[2] The Federal Circuit later reversed the Claims Court's dismissal, holding that the exchange process, including the citizen's suit litigation, was not a prerequisite to or inconsistent with pursuing just compensation in the Claims Court. *See Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1556, 1560 (Fed. Cir. 1985).

never even hinted that the statute might divest the Claims Court of jurisdiction because of Amici's citizen's suit. After the Federal Circuit reversed the dismissal of Amici's Claims Court action, the government sought to postpone the trial in the Claims Court so that the exchange process could proceed even longer. The government relied squarely on § 1500, but argued only that it supported postponing trial in the Claims Court, not dismissing the case altogether. Ultimately, the trial was held and the citizen's suit was stayed pending the outcome in the Claims Court.

After the Claims Court entered judgment for Amici, the government appealed and ultimately petitioned this Court for a writ of certiorari. Again, in neither instance did the government ever argue that § 1500 affected the jurisdiction of the Claims Court, presumably because the law was then clear that a later-filed District Court suit did not implicate § 1500. *See Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct. Cl. 389 (1965), *cert. denied*, 382 U.S. 976 (1966). Indeed, prior to the Federal Circuit's *sua sponte* revisiting of *Tecon*, the government had expressly *conceded* the correctness of that decision. *See Clark v. United States*, 8 Cl. Ct. 649, 652 (1985).[3] In addition, the law was clear that § 1500 did not prevent a plaintiff from simultaneously litigating separate claims against the United States in two courts where the two actions sought different forms of relief and neither court had jurisdiction to award both. *See Casman v. United States*, 135 Ct. Cl. 647 (1956). It was not until 1992, after the Federal Circuit overruled *Tecon* and *Casman* in the present case, that the government belatedly argued that the Claims Court lacked jurisdiction to enter its 1989 judgment for Amici, and it did so even though, as noted, the government's own actions had required Amici to file their District Court suit in the first place.

[3] Moreover, in oral argument before the Federal Circuit panel in this case, the government argued that *Tecon* was "good law"—a position it said had been approved "up to very high levels of the Department [of Justice]." Official Federal Circuit Audiotape of Oral Argument, Nos. 89-1638, 89-1639 and 89-1648 (Feb. 9, 1990).

Finally, even after seizing on the decision below and launching its belated jurisdictional attack, the government then attempted to prevent Amici from curing any potential problems raised by the continued pendency of their long-dormant citizen's suit. After the government moved to set aside the Claims Court judgment, Amici sought a voluntary dismissal of their District Court action so that they could subsequently refile certain post-judgment motions[4] and a protective second complaint. Amici filed a second complaint out of an abundance of caution and in order to preserve their contention that even if the 1989 judgment in their favor were somehow held to be void by reason of the Federal Circuit's decision in this case, § 1500 could not prevent Amici from relitigating their claim for just compensation after the citizen's suit was no longer pending. Nevertheless, the government sought to frustrate Amici's efforts to comply with the government's own new interpretation of § 1500. The government declined to consent to a dismissal of the District Court citizen's suit and it opposed Amici's motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2). The District Court, however, rejected the government's contentions and granted Amici's motion to dismiss. Following that dismissal, Amici refiled their post-judgment motions in the Claims Court and filed a protective second complaint.

[4] After all avenues of appeal had been exhausted and this Court had denied certiorari, Amici filed a motion in the Claims Court for reimbursement of their attorneys' fees and litigation expenses, and a motion pursuant to that Court's Rule 60(a) (identical to Fed. R. Civ. P. 60(a)) to clarify the amount of interest to which Amici are entitled. Those motions were pending when the government moved to set aside the 1989 judgment and dismiss Amici's complaint. In an effort to assure that the Claims Court would have jurisdiction to decide Amici's post-judgment motions notwithstanding the Federal Circuit's decision in this case, Amici refiled those motions after the District Court had dismissed their citizen's suit.

Based on the foregoing, Amici obviously have a substantial interest in this case and have filed this brief to make three points. First, Amici urge the Court to reverse the Federal Circuit's erroneous interpretation of § 1500, which forces a plaintiff to elect between two separate statutory claims merely because that plaintiff is required by law to bring those claims in separate courts. Second, Amici urge the Court to make clear that its ruling, regardless of the outcome, will in no event affect Claims Court judgments that are final and as to which all avenues of appeal have been exhausted. And third, Amici ask that the Court make clear that § 1500 can in no event prevent a plaintiff from bringing *successive* actions against the United States in separate courts, as long as the actions are not pending at the same time.

SUMMARY OF ARGUMENT

Section 1500 was intended to prevent duplicative litigation against the government, but was not intended to force plaintiffs to elect between two separate statutory claims that cannot both be brought in the same court. Consequently, the Court should reverse the decision below and hold that § 1500 does not prohibit the simultaneous litigation of such claims in separate courts. In no event, however, should the Court's ruling allow the government to attack final judgments that were fully-appealed prior to the decision below. As the Court has repeatedly stressed, principles of finality and repose prevent a party from disturbing such judgments based on a subsequent change in the law relating to jurisdiction. Finally, the Court should make clear that § 1500 does not prevent a plaintiff from litigating claims against the United States sequentially in different courts.

ARGUMENT

I. SECTION 1500 DOES NOT PREVENT THE SIMULTANEOUS LITIGATION OF SEPARATE STATUTORY CLAIMS THAT CANNOT BE BROUGHT IN THE SAME COURT

Section 1500 prohibits the Claims Court from assuming jurisdiction over "any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States . . . ." 28 U.S.C. § 1500 (1988). Thus, this provision applies only when the plaintiff simultaneously litigates the same claim against the government in two courts, but not when the plaintiff litigates different claims in different courts. The latter point applies with particular force to plaintiffs such as Amici, who were required by law to bring their claims in separate courts. Section 1500 was intended to be a shield protecting the government from duplicative litigation; nothing in its text or legislative history indicates that it was intended to be a sword cutting off separate statutory claims merely because they cannot be brought in the same court.

The question of what constitutes separate claims under § 1500 was decided long ago in *Casman v. United States*, 135 Ct. Cl. 647 (1956), a holding that stood for over 35 years. There, a plaintiff who was wrongfully terminated from his government post sued the United States in District Court for an injunction restoring him to his position, and subsequently brought an action in the Court of Claims seeking to recover his salary. The Court of Claims ruled that these actions had to proceed in separate courts and did not run afoul of § 1500:

> Plaintiff's suit in the district court asks for nothing but injunctive relief and his suit in this court asks for a money judgment for back pay. Since plaintiff has no right to elect between two courts, section 1500, *supra*, is inapplicable in this case. To hold otherwise would be to say to plaintiff, "If you

> want your job back you must forget your back pay"; conversely, "If you want your back pay, you cannot have your job back." Certainly that is not the language of the statute nor the intent of Congress.
>
> Plaintiff does not have pending in any other court a suit "for or in respect to" his claim for back pay within the meaning of section 1500, *supra*.

Id. at 650.[5] *Casman*, however, was expressly overruled by the Federal Circuit in the present case. *See UNR Industries, Inc. v. United States*, 962 F.2d 1013, 1022 n.3 (Fed. Cir. 1992).

Amici submit that *Casman* sets forth the proper interpretation of § 1500 and that the Federal Circuit erred in overruling that case.[6] At most, § 1500 requires a plaintiff to elect one forum to pursue a single claim against the

[5] Former § 1491 of Title 28 was amended in 1972 to allow the Court of Claims to grant equitable relief of the type that the plaintiff in *Casman* could only have obtained in the District Court. *See* Pub. L. No. 92-415, § 1, 86 Stat. 652 (1972) (codified as amended at 28 U.S.C. § 1491(a)(2) (1988)); S. Rep. No. 1066, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3116, 3117-18 (amendment obviates need for wrongfully discharged government employee to file two lawsuits in order to obtain complete relief).

[6] *Casman* in no way conflicts with this Court's decision in *Corona Coal Co. v. United States*, 263 U.S. 537 (1924). In that case, plaintiff had filed a District Court action, "the causes of action therein set forth being the same" as those in a Court of Claims action. *Id.* at 539.

Neither did *Corona Coal* address the question decided in *Tecon*: whether a later-filed District Court action will divest the Claims Court of jurisdiction under § 1500. In *Corona Coal*, that issue was neither raised by the parties, nor discussed or decided by the Court. Accordingly, *Corona Coal* is not *stare decisis* on that question. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (an issue "not . . . raised in briefs or argument nor discussed in the opinion of the Court" is not *stare decisis*); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

government; but § 1500 does not require a plaintiff to forfeit one of two distinct claims that must be brought in separate courts. As with the plaintiff in *Casman*, Amici sought two different forms of relief that could not be obtained in the same court—just compensation under the Fifth Amendment and an injunction requiring the Secretary of the Interior to offer a coal exchange in compliance with SMCRA.[7]

Moreover, the government forced Amici to file their District Court action, as the government had convinced the Claims Court that Amici were required to exhaust the SMCRA exchange process before they could pursue an action for just compensation, and the government's unreasonable delay of that process required Amici to file their citizen's suit to compel progress. In these circumstances, § 1500 should not be construed to penalize Amici for doing that which the law as expounded in 1984 required. As the Court of Claims held in *Brown v. United States*, 358 F.2d 1002, 1004, 175 Ct. Cl. 343, 348 (1966) —also overruled by the decision below (*see* 962 F.2d at 1022)—§ 1500 cannot be used to "deprive plaintiffs of the only forum they have in which to test their demand for just compensation."

Thus, as in *Casman*, § 1500 cannot affect the 1989 Claims Court judgment in favor of Amici even if that judgment were still open to attack.[8] To hold otherwise would force a plaintiff to forbear from litigating a potentially valid claim, thereby risking a statute of limita-

[7] The Claims Court's authority to grant injunctive relief did not encompass the relief sought by Amici in the District Court. *See* 28 U.S.C. § 1491(a)(2), (3) (1988). In addition, SMCRA citizen's suits "may be brought only in the judicial district in which the surface coal mining operation complained of is located." 30 U.S.C. § 1270(c)(1) (1988). *See also Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541 (D.C. Cir. 1992). Finally, the District Court did not have jurisdiction over Amici's claim for just compensation in excess of $10,000. *See* 28 U.S.C. § 1346(a)(2) (1988).

[8] As explained below, Amici's judgment cannot be attacked based on a subsequent change in the law. *See infra* at 10-13.

tions bar, until another separate claim has been adjudicated in a different court.[9] Section 1500 was intended to prevent duplicative litigation, but it was not intended to extinguish claims against the government. The Court should so hold in this case.

II. IN NO EVENT SHOULD THE COURT'S RULING CALL INTO QUESTION THE VALIDITY OF FINAL JUDGMENTS AS TO WHICH ALL AVENUES OF APPEAL HAD BEEN EXHAUSTED BEFORE THE DECISION BELOW

Amici's judgment for $60,296,000 plus interest was final and fully-appealed as of the date this Court denied the government's petition for a writ of certiorari in November 1991. Nevertheless, the government has now attempted to attack that judgment based on the Federal Circuit's subsequent reinterpretation of § 1500 in the decision below. Thus, Amici's situation demonstrates the far-reaching scope ascribed by the government to the decision below. Not only does the government seek to undo *pending* cases that had previously been predicated on settled interpretations of § 1500, but it seeks to do the same to judgments that were already final and fully-appealed before the Federal Circuit overruled its prior § 1500 jurisprudence. Regardless of the merits of this

[9] As noted below, this dilemma could perhaps be ameliorated by the doctrine of equitable tolling. *See infra* at 13-14 n.12. However, the government—the intended beneficiary of § 1500—would be no better off, and in fact might be worse off, if plaintiffs must litigate separate claims sequentially. To the extent one action may have some preclusive effects on the other, one of the actions could be stayed (as occurred with Amici's citizen's suit and was the general practice under *Casman*), thereby preventing the government from wasting resources by defending both suits at once. And in other instances, the government will benefit from addressing both actions simultaneously. Since the government will have to defend the separate actions in any event, it would be well-served to pool its resources and address them at the same time, rather than engage in potentially duplicative litigation involving stale claims. Indeed, it is for precisely this reason that *res judicata* principles generally require a plaintiff to bring all claims in a single action.

overruling, the government should not be permitted to rely on it to overturn previously-final judgments. Accordingly, even if the Court affirms the decision below or otherwise adopts an interpretation of § 1500 at odds with prior law, it should make clear that its ruling cannot be the basis for attacks on final judgments as to which all avenues of appeal had been exhausted prior to the change in the law brought about by this case.

This Court has repeatedly made clear that final judgments may not be attacked based on a change in the law that occurred after all avenues of appeal had been exhausted. As the Court held in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), "[t]he past cannot always be erased by a new judicial declaration." *Id.* at 374. Although the lower federal courts have only limited jurisdiction,

> none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. *Their determinations of such questions, while open to direct review, may not be assailed collaterally.*

Id. at 376 (emphasis added). *Accord, Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment").[10]

Accordingly, in *Chicot County* the Court held that the failure of a party to challenge subject matter jurisdiction on direct review precluded that party from subse-

[10] *See also Dowell v. Applegate*, 152 U.S. 327, 340 (1894); *Des Moines Navigation and Railroad Co. v. Iowa Homestead Co.*, 123 U.S. 552, 557 (1887); *McCormick v. Sullivant*, 23 U.S. (10 Wheat.) 192, 199 (1825).

quently attacking the final and fully-appealed judgment based on a later change in the law. Applying this same principle, the lower federal courts have uniformly held that a final judgment is not rendered "void" within the meaning of Fed. R. Civ. P. 60(b)(4)—and thereby subject to attack after direct review—merely because of a subsequent change in the law relating to jurisdiction. Those cases have held that a judgment may be subject to such attack only where the court's exercise of jurisdiction constituted a clear usurpation of power in light of the governing law at the time of the court's decision.[11] This was plainly not the case with respect to Amici's claim, as the Claims Court properly assumed jurisdiction under settled law that was not overruled until after its 1989 judgment had become final. And the same is true of countless other long-since-final judgments of the Claims Court.

For these reasons, Amici urge the Court to make clear that any re-interpretation of § 1500 will not affect judgments that are final and as to which all avenues of appeal had been exhausted prior to the decision below. Long-standing principles of finality and repose compel this result. Otherwise, litigation would never end. It cannot be the law that every new interpretation of a jurisdictional provision applies not only to cases then pending in the trial court or on direct review, but also calls into question untold numbers of long-since-final and fully-appealed judgments. The Court should expressly reject that result in this case. As was recently recognized in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), "once suit is barred by res judicata or by statutes of limitation

[11] *See, e.g., Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990); *United States v. Zima*, 766 F.2d 1153, 1159-61 (7th Cir. 1985); *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 226 (10th Cir. 1979); *Ben Sager Chemicals Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977); *Lubben v. Selective Serv. System Local Bd. No. 27*, 453 F.2d 645, 649-50 (1st Cir. 1972); *Independence Mortgage Trust v. White*, 446 F. Supp. 120, 123-24 (D. Ore. 1978).

or repose, a new rule cannot reopen the door already closed." *Id.* at 2446 (Opinion of Souter, J.) (citing *Chicot County*).

III. SECTION 1500 DOES NOT DIVEST THE CLAIMS COURT OF JURISDICTION WHEN TWO ACTIONS ARE NOT PENDING SIMULTANEOUSLY

By its terms, § 1500 affects the jurisdiction of the Claims Court only when the same claim is "*pending* in any other court." 28 U.S.C. § 1500 (emphasis added). Accordingly, under any interpretation of § 1500, that statute does not apply unless two actions are pending in more than one court *at the same time*; it does not prohibit *sequential* litigation against the United States in separate courts.

Neither the Federal Circuit nor the government has taken a contrary view. In the decision below, the Federal Circuit held that "if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata apply." 962 F.2d at 1021. Similarly, the government has stated in this case that:

> The jurisdictional bar of Section 1500 remains in force until suit or process in the other court is terminated. Once the other suit is terminated, the plaintiff may then sue in the Claims Court, as long as the action is not barred by the statute of limitations.

Brief of the United States in Opposition at 11 (No. 92-166).[12]

[12] Amici disagree with the government to the extent it argues that the statute of limitations would not be tolled if a plaintiff were prevented from bringing a Claims Court action until the termination of another suit in another court. The Federal Circuit did not reach this question, but Chief Judge Nies explicitly stated in her concurring opinion that the doctrine of "equitable tolling" should be applied in such instances. As Chief Judge Nies wrote, "[w]here a party has possibly two claims for relief and is barred from asserting

Thus, even if the Court were to affirm the decision below, it should also confirm that § 1500 applies only when two claims are pending simultaneously, and that it in no event prevents a plaintiff from sequentially litigating separate claims against the United States in the Claims Court and elsewhere. The only bar to such litigation is the law of *res judicata*.

CONCLUSION

The Court should reverse the decision below and restore § 1500 to the role intended by its drafters. In no event, however, should the Court permit § 1500 to be used to attack final judgments as to which all avenues of appeal had been exhausted prior to the decision below or to bar a plaintiff from sequentially litigating claims against the government.

Respectfully submitted,

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them concurrently by section 1500, I do not believe the period allowed for bringing the additional or alternative claim should arbitrarily be cut off or even shortened. Section 1500 does not require such forfeiture." 962 F.2d at 1026. As explained above, Amici believe this same reasoning leads to the conclusion that § 1500 does not bar concurrent litigation of separate claims that cannot be brought in the same court. However, even if the Court were to decline to adopt that interpretation, it should nonetheless prevent confusion by making clear that the doctrine of equitable tolling would prevent the forfeiture of the second claim.